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August 31, 2011

Marlene H. Dortch, Secretary
Federal Communication Commission
445 12th Street, S.W.
Washington, DC 20554

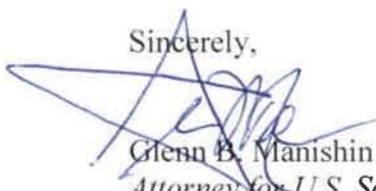
Re: *Petition of GCB Communications, Inc. d/b/a Pacific Communications
and Lake Country Communications, Inc. for Declaratory Ruling
WC Docket No. 11-141*

Dear Ms. Dortch:

Enclosed for filing are an original and three copies of the Opposition of U.S. South Communications, Inc. to the captioned petition for declaratory ruling. U.S. South was the prevailing party in the federal court litigation giving rise to this primary jurisdiction referral proceeding.

The Wireline Competition Bureau has recently invited public comment on the Petition. U.S. South's enclosed Opposition, the filing of which has been consented to by counsel for Petitioners, is without prejudice to our right to submit comments and/or reply comments in response to the WCB Notice.

Sincerely,


Glenn B. Manishin
Attorney for U.S. South Communications,
Inc.

cc: Glenn B. Hotchkiss, Esq.
Albert H. Kramer, Esq.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Petition of GCB Communications, Inc.
d/b/a Pacific Communications and Lake
Country Communications, Inc. for
Declaratory Ruling

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WC Docket No. 11-141

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**OPPOSITION OF U.S. SOUTH
TO PETITION FOR DECLARATORY RULING**

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Counsel for U.S. South Communications, Inc.

Dated: August 31, 2011

SUMMARY

U.S. South was the prevailing party in the underlying federal court litigation giving rise to this primary jurisdiction referral. U.S. South does not object to the Commission providing declaratory ruling relief to clarify the meaning and operation of its payphone compensation rules, and indeed sought to refer this issue to the Commission, over the opposition of the payphone service provider (PSP) Petitioners, at trial and on appeal. The interpretation of those rules now proposed by Petitioners, however — one that would make a nullity of this Commission's requirements for Flex-ANI transmission and permissible carrier use of Flex-ANI technology for tracking payphone-originated calls to completion — is unjustified and unwarranted.

The Commission should respond to the courts by reiterating that payphone-specific Flex-ANI must be transmitted with each payphone-originated call and by declaring that an interexchange carrier may permissibly rely on Flex-ANI to identify payphone calls consistent with the longstanding mandate that carriers deploy an "accurate" payphone call-tracking system under Section 64.1310(a)(1) of the FCC's per-call payphone compensation rules. 47 C.F.R. § 64.1310(a)(1). It would make no legal or policy sense, as Petitioners here contend, for the huge undertaking of Flex-ANI implementation, an integral part of the Commission's shift more than a decade ago from a per-phone to per-call payphone compensation scheme, to be completely irrelevant to a carrier's obligations under the Commission rules implementing Section 276 of the Communications Act of 1934. 47 U.S.C. § 276.

There is no basis in the Commission's payphone plan, its various orders and waiver decisions or public policy under Section 276 to impose payment liability on carriers who, as in this case, have done everything required of them under the payphone regulations. Petitioners have a remedy under the Act against their serving LECs if, like here, Flex-ANI is not correctly

transmitted with their payphone calls, so there is no question of PSPs being left without compensation. Yet Petitioners and other PSPs may not, under the existing payphone compensation scheme, lawfully or fairly transfer that liability to Completing Carriers like U.S. South in the absence of any proof that the IXC violated the Commission's payphone regulations.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of GCB Communications, Inc.)	WC Docket No. 11-141
d/b/a Pacific Communications and Lake)	
Country Communications, Inc. for)	
Declaratory Ruling)	

**OPPOSITION OF U.S. SOUTH
TO PETITION FOR DECLARATORY RULING**

U.S. South Communications, Inc. (“U.S. South”), by its attorney and pursuant to Sections 1.2 and 1.45(b) of the Commission’s Rules, 47 C.F.R. §§ 1.2, 1.45(b), hereby opposes the declaratory ruling sought by the payphone service provider (“PSP”) petitioners, GCB Communications, Inc. and Lake Country Communications, Inc. (collectively “Petitioners”), in the captioned proceeding.¹

INTRODUCTION

U.S. South was the prevailing party in the underlying federal court litigation giving rise to this primary jurisdiction referral.² U.S. South does not object at all to the Commission provid-

¹ The Wireline Competition Bureau invited public comment on the Petition on August 25, 2011. U.S. South reserves its right to submit comments and/or reply comments in response to the WCB Notice in addition to this formal Opposition.

² *GCB Comms., Inc. v. U.S. South Comms., Inc.*, No. 07-cv-02054-SRB (D. Ariz. Oct. 30, 2009), *rev’d*, 2011 U.S. App. LEXIS 8882, 53 Comm. Reg (P&F) ¶ 176 (9th Cir. April 29, 2011), *rehearing denied*, Order, No. 09-17646 (9th Cir. May 23, 2011). A copy of the Court of Appeals’ slip opinion is annexed as Exhibit 1 for the convenience of the Commission and its staff; it is also available at <http://www.ca9.uscourts.gov/datastore/opinions/2011/04/29/09-17646.pdf>.

U.S. South sought a primary jurisdiction referral to the Commission for interpretation of the payphone rules, but was opposed by Petitioners at trial and on appeal. *GCB*, 2011 U.S. App. LEXIS 8882 at *11-12, slip op. at 5588-89. We therefore readily agreed to this consensual

ing declaratory ruling relief to clarify the meaning and operation of its payphone compensation rules under Section 276 of the Communications Act of 1934, 47 U.S.C. § 276. Rather, we submit that Petitioners' requested interpretation of those rules — one that would make a nullity of this Commission's requirements for Flex-ANI transmission and permissible carrier use of that technology for tracking payphone-originated calls to completion — is unjustified and unwarranted.

To the contrary, the Commission should respond to the courts by declaring that an interexchange carrier ("IXC") may rely on Flex-ANI to identify payphone calls consistent with the longstanding mandate that carriers deploy an "accurate" payphone call-tracking system.³ It would make no legal or policy sense, as Petitioners contend, for the huge undertaking of Flex-ANI implementation, an integral part of the Commission's shift more than a decade ago from a per-phone to per-call payphone compensation scheme, to be completely irrelevant to a carrier's obligations under the Commission rules implementing Section 276.

BACKGROUND

The issue before this Commission is the same as that addressed by the Court of Appeals for the Ninth Circuit, namely "whether U.S. South was required to pay GCB for completed coinless payphone calls — dial-around calls — if U.S. South did not receive coding digits that would identify the calls as GCB payphone calls." *GCB Comms., Inc. v. U.S. South Comms., Inc.*, 2011 U.S. App. LEXIS 8882 at *1, slip. op. at 5583 (9th Cir. April 29, 2011). Although they disparage the Ninth Circuit's analysis, including claiming falsely that it relied on only "a single

referral and concur that the Court of Appeals' opinion encouraged such action by the district court on remand. *Petition* at 8 & n.7, quoting *GCB*, slip op. at 5596 n.20.

³ 47 C.F.R. § 64.1310(a)(1).

Payphone Order in isolation,”⁴ Petitioners cannot and do not argue that the Court of Appeals improperly framed the issue:

GCB’s argument is that when U.S. South completed calls made from GCB’s payphones, U.S. South owed it dial-around compensation for the calls, even if the proper coding was absent or incorrect at the time U.S. South received them. Both parties make factual arguments disclaiming fault for the failure of Flex-ANI digits to appear with the disputed calls at the time U.S. South received them. Beyond that, GCB contends that the FCC regulations require completed calls to be compensated, without regard to whether the completing carrier received Flex-ANI coding, or to why it was not received. . . . [T]he district court held that because “the relevant regulations placed the burden for accurately tracking calls on the completing carrier (U.S. South) and not the PSP (plaintiffs),” U.S. South owes GCB dial-around compensation for the disputed calls “regardless of whether the proper Flex-ANI digits were transmitted.”

GCB, slip op. at 5585 (citations omitted).

In this context, the *Petition* seeks to elevate the district court’s flawed reasoning into a rigid rule of law that contradicts the reality of payphone calls, which are handled by numerous parties in addition to the PSP and the “completing carrier.” The question is not whether PSPs alone are required to “ensure” that Flex-ANI codes are in fact transmitted with each of their payphone calls. *Petition* at 6, 8, 9. Instead, it is whether a so-called Completing Carrier⁵ may permissibly rely on Flex-ANI as the basis for its call-tracking system under the Commission’s rules. If the answer to that question is yes — as it most assuredly is — then there is no basis in the Commission’s payphone compensation plan, its various waiver orders or public policy under

⁴ *Petition* at 6. In fact, the Court of Appeals’ opinion shows the panel expressly cited and relied on the entire series of Commission rules, decisions and orders, which as discussed below all state that Flex-ANI must be “transmitted” with every payphone call as part of its ANI. Slip op. at 5589 n.9, 5590 & nn.10-11, 5591, 5593 & n.18; *see infra* at 10-13.

⁵ 47 C.F.R. § 64.1300(a).

Section 276 to impose payment liability on carriers who, as in this case, have done everything required of them under the payphone rules.⁶

Nothing in Section 276 or the Commission's implementing rules can or should make carriers' payphone compensation obligations a matter of strict liability or reduce the costly and long process of converting local exchange carrier ("LEC") central offices to Flex-ANI compatibility to a matter of legal irrelevance. Petitioners have a remedy under the Act against their serving LECs if Flex-ANI is not transmitted with payphone calls in accordance with the payphone rules, and should not be permitted unilaterally to transfer that liability to carriers like U.S. South.

It is important in this context to precisely delimit the requirement imposed by Congress in Section 276 of the Act. Section 276 is not self-executing; its command is that that *the Commission* establish a "per-call payphone compensation plan" to ensure that PSPs receive compensation for "each and every completed [payphone] call." 47 U.S.C. § 276. A carrier is therefore obligated to remit payphone compensation in accordance with the Commission's implementing rules. Conversely, a PSP cannot independently enforce Section 276, but instead may seek damages under the Act from a carrier for non-payment if the carrier violates the Commission's implementing rules, which the FCC has rightfully held is an "unreasonable practice" for purposes of Section 201.⁷

⁶ Revealingly, Petitioners' court complaint did not assert that U.S. South violated any regulation promulgated pursuant to Section 276 of the Act as part of the "per-call payphone compensation plan" developed by the Commission in its series of multiple decisions from 1996 to 2004.

⁷ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19990 at ¶ 32 (2003) (failure to remit compensation pursuant to the FCC's payphone rules is "an unjust and unreasonable practice"). See 47 U.S.C. § 201; *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007); *Metrophones Telecomms., Inc. v. Global*

In that light, a proper understanding of the history and structure of the Commission's lengthy efforts to balance the rights and obligations of PSPs, LECs and IXC's with respect to identifying, tracking and compensating payphone calls is vital. The Commission recognized that because answer supervision is provided on call termination only to the last IXC handling a payphone call — known as a "Completing Carrier" — it was important to require IXC's to establish and deploy a system for tracking payphone calls to completion, as the Completing Carrier alone has direct access to completion data. At the same time, the Commission understood and expressly recognized that when Section 276 was enacted, Completing Carriers had no technical means to identify calls as originating from payphones because the "coding digits" associated with such calls were not unique to payphones. Accordingly, the Commission and the Bureau imposed two parallel requirements.

1. LECs were required to deploy a system of Flex-ANI that utilizes unique coding digits transmitted in a call's ANI to identify a call as having originated from a payphone.⁸
2. IXC's were required to establish a system that "accurately" tracks completed calls, to issue periodic reports to PSPs and to certify annually, via independent audit, the compliance of their call-tracking systems with the Commission's payphone rules.⁹

Crossing Telecomms., Inc., 423 F.3d 1056, 1064 (9th Cir. 2005) ("[a] failure to pay in accordance with the Commission's payphone rules . . . constitutes . . . an unjust and unreasonable practice in violation of § 201(b) of the Act"), *aff'd*, 550 U.S. 45 (2007).

⁸ See below at Section I(A) for a full discussion of the Commission's many reiterations of the requirement that LECs "transmit" coding digits with each payphone-originated call. As the Bureau explained in 1998: "We clarify in this order that *the transmission of payphone-specific coding digits by LECs through Flex-ANI is required* unless a LEC hardcodes into all of its switches all the payphone-specific coding digits discussed herein as necessary for identifying payphones calls for per-call compensation." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5001 at ¶ 2 n.9 (1998) (emphasis supplied).

⁹ 47 C.F.R. § 64.1310(a)(1) (call tracking); 47 C.F.R. § 64.1320(a) (audits).

These dual requirements were fundamental to the Commission's efforts to implement Section 276. Recognizing that per-call compensation was not at first technically feasible, the Commission initially mandated a transitional system of per-phone compensation, under which each IXC (exceeding a revenue threshold) paid to PSPs a fixed charge per phone based on a list of payphone ANIs issued quarterly by the LECs.¹⁰ In order to supply the information to IXCs necessary to support a per-call compensation scheme, the Commission then ordered the LECs to deploy Flex-ANI to provide a means of differentiating payphone-originated calls, eligible for compensation if completed, from other calls encompassed in the prior system of ANI "information digits" or "ANI ii" (such as hotel, hospital and other "restricted" phones for which billing to the line was not permitted).¹¹ Together, these twin mandates allowed IXCs to identify payphone calls, and thus program their switches to record completion data for such calls, permitting payment of compensation to PSPs on a per-call basis. Compensation was and remains due at the FCC-prescribed "default" rate in the absence of a PSP/IXC agreement on per-call compensation charges. 47 C.F.R. § 64.1330(d).

It is in this context that the present primary jurisdiction referral comes before the Commission. The federal court litigation established that Petitioners and U.S. South had not agreed on a per-call compensation rate. It is also undisputed that U.S. South properly remitted compensation at the prescribed "default" per-call rate for *every* completed call that included associated Flex-ANI data identifying it as a payphone call.¹² Petitioners were unable to prove

¹⁰ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 20541, 20567, 20578 at ¶¶ 50, 72 (1996).

¹¹ *Id.* at 20597-98 ¶ 113.

¹² "The parties agree that U.S. South has compensated GCB for all calls for which U.S. South received the payphone specific Flex-ANI coding digits." *GCB*, slip op. at 5585 n.3. The

why the disputed calls lacked correct Flex-ANI identifiers and declined to introduce evidence from their serving LECs that Flex-ANI had been correctly transmitted. Nor did they claim, let alone prove, that U.S. South's call tracking system was in any way deficient or otherwise violated the requirement of Section 64.1310(a)(1) of the rules that each carrier utilize an "accurate" call tracking methodology.¹³

It was only by means of a tortured interpretation of the Commission's rules that the district court was able to enter judgment for Petitioners. "[T]he district court determined the result based on a legal conclusion: it interpreted the FCC regulations on dial-around compensation to require that once PSPs 'set up (or provision) their payphone lines with Flex-ANI capability' they are owed compensation for completed calls, even if the Flex-ANI coding is not sent to or received by the completing carrier." *GCB*, slip op. at 5585. The Court of Appeals reversed, concluding that the Commission's 1996, 1998 and 2003 payphone orders — which require that "LECs transmit payphone-specific coding digits to PSPs, and that PSPs transmit those digits from their payphones to IXC's" — mean that Flex-ANI codes must accompany each compensable payphone call "because the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP. That, in the long run, facilitates the prompt payment of amounts owed to all PSPs." *Id.*, slip op. at 5592.

The purpose of this primary jurisdiction referral is for the Commission to decide whether the Court of Appeals was correct. Petitioners continue to assert that they have no responsibility to transmit Flex-ANI coding digits, but the Ninth Circuit did not rule they did. Instead, the Court

disputed calls were received by U.S. South without the required 27 or 70 Flex-ANI payphone identifiers. Overwhelmingly, U.S. South received incorrect 00 or 07 info digits for these calls.

¹³ 47 C.F.R. § 64.1310(a)(1).

of Appeals expressly recognized “the fact that in the way the industry developed, the Flex-ANI codes are not directly transmitted by the payphones themselves — those phones are not set up to do so.” *Id.*, slip op. at 5592. The Court’s opinion explains that *as between PSPs and Completing Carriers*, the risk for absent or incorrect Flex-ANI information falls on the PSP.¹⁴ If the Ninth Circuit is right, as U.S. South respectfully suggests it was, that does not mean a PSP is to be denied compensation for completed calls for which specific payphone Flex-ANI was missing. Instead, it only means that a Completing Carrier which utilizes Flex-ANI as the basis for its call tracking system cannot be required to compensate PSPs for calls missing correct Flex-ANI information where, as here, there is no showing that it did anything wrong. When something fails in the Flex-ANI system, one of the many entities involved in a payphone call (the PSP, the originating LEC, the intermediate carrier or the Completing Carrier) should be held accountable. But in the absence of evidence, as in this case, that the failure was the fault of the Completing Carrier, there is no basis in the Commission’s rules to impose liability on that party under Section 201 for an “unreasonable practice.”

¹⁴ “[I]t is the duty of the PSP — vis-a-vis the completing carrier — to make sure” that Flex-ANI is transmitted because “for payphones to be eligible for compensation ‘payphones will be required to transmit specific payphone coding digits.’” *Id.*, slip op. at 5592-93, quoting *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5006-07 at ¶ 13 (1998).

ARGUMENT

I. PETITIONERS FRAME THE WRONG ISSUE FOR FCC RESOLUTION BY IGNORING THE FUNCTION OF FLEX-ANI AS AN INTEGRAL PART OF A CARRIER'S "ACCURATE" CALL-TRACKING SYSTEM

The *Petition* properly sets out the specific question referred by the district court (*Petition* at 3), but frames the inquiry incorrectly by ignoring the function of Flex-ANI as an integral part of a Completing Carrier's "accurate" call-tracking system under Section 64.1310(a)(1) of the Commission's payphone compensation rules. There is no dispute that, despite the repeated language used by the Commission throughout 1996 through 1998, even "smart" payphones do not themselves actually transmit Flex-ANI information. That function is performed by LECs at the central office serving a payphone. Under the Commission's rules, IXC's — including switched-based resellers ("SBRs") like U.S. South — are permitted to utilize Flex-ANI as the technical basis for tracking payphone calls to completion.¹⁵ Therefore, in asking whether "the completing carrier is obligated to pay the PSP per-call compensation for completed coinless calls," *Petition* at 3, the district court's referral is inquiring how to harmonize the Commission's Flex-ANI mandate with the obligations imposed on carriers under the Section 276 per-call payphone compensation plan.

That question cannot be answered by looking only in the abstract to the rights and obligations of PSPs. As Petitioners and the federal courts explicitly recognize, there are a number of "carriers in the call path." *Petition* at 3. One of those, the Completing Carrier, has an obligation to deploy a call tracking system. Another of those, the serving (originating) LEC, has an obligation to insert payphone-specific Flex-ANI coding digits into the call set-up information

¹⁵ Completing Carriers are not required to utilize Flex-ANI technology; they may use the technology of their choice to meet their call tracking obligations. *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19994 ¶ 39 (2003).

transmitted along with coinless payphone calls. In cases, such as this one, where there has been an unexplained failure of Flex-ANI transmission, the entitlement of PSPs to per-call compensation cannot be answered by looking only to whether the PSP has ordered a payphone line from the serving LEC. *Id.* That is because the payphone compensation obligations of IXCs arise from the Commission's implementing rules, not Section 276 itself.

Like all Completing Carriers, U.S. South's legal obligation is to remit payphone compensation to PSPs for all completed payphone-originated calls in accordance with the Commission's rules. Petitioners may be correct that their own regulatory obligation is satisfied by ordering a payphone line, which in turn triggers a LEC's obligation to provide payphone-specific Flex-ANI with each call. But that alone does not resolve the issue because it does not indicate one way or another whether the IXC has defaulted on its requirement to deploy and maintain an "accurate" payphone call-tracking system.

There are two sides to the relationship between PSPs and carriers; each has specific obligations under the payphone rules. Where an IXC has not been shown to have failed to comply with the Section 64.1310(a)(1) requirement for an accurate call tracking system, the Commission's payphone regulations have not been violated. That in turn yields the issue on which Petitioners resort to *ipsi dixit*, namely whether a carrier that is presumptively in compliance with the Commission rules is required to remit payphone compensation for calls, as the district court held but the Ninth Circuit reversed, "regardless of whether the proper Flex-ANI digits were transmitted." *GCB*, slip op. at 5585 (citations omitted). As we demonstrate below, that ultimate issue must be decided adversely to Petitioners if the Commission's Flex-ANI mandate and its per-call compensation requirement are to have regulatory significance. To address the issue of a PSP's line-ordering responsibility without reference to the corresponding

obligation of an IXC is to make a nullity of the Flex-ANI mandate and its central function in the transition from a per-phone to per-call payphone compensation system.¹⁶

A. This Commission Has Repeatedly Reaffirmed That Flex-ANI, Where Available, Must Be “Transmitted” With Every Payphone Call

As the Ninth Circuit explained, it is evident that Flex-ANI must accompany each payphone call “because the whole purpose of the Flex-ANI system was to implement a practical way for completing carriers to determine that a call was from a PSP.” *GCB*, slip op. at 5592. The Commission’s payphone rules and orders wholly validate this conclusion. The FCC has repeatedly reaffirmed that Flex-ANI, where available from a LEC central office, must be “transmitted” with every payphone call.

In 1998, the Common Carrier Bureau clarified that the transmission and provision of payphone-specific Flex-ANI codes to carriers with all calls was “a prerequisite to payphone per-call compensation.”¹⁷ This is a straightforward application of the Commission’s payphone orders, which likewise consistently held that Flex-ANI must be “transmitted” and “generated” with every payphone call. For instance, the Commission’s initial 1996 *Payphone Order* concluded that “each payphone should be required to generate 07 or 27 coding digits within the

¹⁶ Petitioners also distort the Court of Appeals’ ruling by claiming, without citation, that the Ninth Circuit “shifted the burden of ensuring that dial-around calls are properly tracked as they progress through the call path squarely on the PSP instead of on the Completing Carrier.” *Petition* at 8. Nonsense. What the Court ruled is plain and altogether sensible: “GCB, *through its LEC*, must assure that the Flex-ANI is transmitted into the system; their duty ends there. . . . Others have the duty of tracking and capturing that information, one way or another, once it is sent into the system.” *GCB*, slip op. at 5593, 5595 (emphasis supplied).

¹⁷ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5006 at ¶ 13 (1998).

ANI for the carrier to track calls.”¹⁸ In its 1996 *Reconsideration Order*, the Commission clarified that “[e]ach payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line.”¹⁹

The later 1998 Bureau *Coding Digit Waiver Order* reiterated that “for payphones to be eligible for compensation, payphones will be required to transmit specific payphone coding digits,”²⁰ and that “[t]his limited waiver applies to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXC’s for subscriber 800 and access code calls.”²¹ Indeed, the *Coding Digit Waiver Order* uses “transmit” or “transmitting” to describe the requirement that payphone-specific coding digits be provided more than 50 times. And as the Commission’s 2003 *Remand Order* summarized, “in order to track a payphone call to completion, an [SBR] must identify *whether a call originates from a payphone (via information digits)*, where it originates and terminates (via ANI information), and whether it is completed and therefore compensable (via answer supervision).”²²

More generally, the Commission’s compensation plan utilized an initial transition period of per-phone compensation, in which carriers exceeding a certain size were directed to remit a

¹⁸ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 20541, 20591 at ¶ 98 (1996).

¹⁹ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd. 20541, 20591 at ¶ 64 (1996).

²⁰ 13 FCC Rcd. at 5006 ¶ 13 (citation omitted).

²¹ *Id.* at 5007 ¶ 14.

²² *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19992-93 ¶ 35 (2003) (emphasis supplied).

specified amount to each ANI identified as a payphone by the serving LEC.²³ This was replaced one short year later (subject to extensions via waiver) with a per-call system under which the transmission of payphone-specific coding digits is explicitly a “prerequisite” to compensation. Denying carriers the right to rely on Flex-ANI is thus the equivalent of requiring that they pay off of payphone ANI lists, the very system the Commission resolved as a matter of administrative policy should be in place only temporarily.

Petitioners devote an inordinate portion of their pleading to rationalizing what the Commission intended by stating repeatedly that payphones must “generate” and “transmit” Flex-ANI. *E.g.*, *Petition* at 10-11, 15-19. Yet there is no question that Flex-ANI is not in fact generated today by payphones, and that neither the district court nor the Ninth Circuit have imposed any such requirement. Perhaps the Commission or the Common Carrier Bureau misunderstood the expected capabilities of “smart” payphones when the compensation plan was developed more than a decade ago.²⁴ But it is self-evident that the Commission explicitly linked Flex-ANI availability from “each payphone” with a carrier’s ability to identify payphone-originated calls for compensation purposes. As the Bureau explained, “before they can receive per-call compensation from IXC’s for subscriber 800 and access code calls,” payphone calls must

²³ “Because call tracking did not then exist, the Commission ordered that compensation be paid on a per-phone, rather than per-call basis.” *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21277 ¶ 6 (2002).

²⁴ The Bureau believed at the time that “[a] payphone is ‘coding-digit-capable’ when it is able to transmit payphone-specific coding digits that are capable of reaching an IXC point of presence (POP) for subscriber 800 and access code calls from payphones using 10XXX and 101XXXX.” *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd. 4998, 5520 at ¶ 36 (1998).

include “payphone-specific coding digits.” 13 FCC Rcd. at 5007 ¶ 14.²⁵ The Ninth Circuit thus properly reasoned that whether Flex-ANI is transmitted by the PSP or its serving LEC is immaterial to the fact that the Commission has required that all payphone calls include correct Flex-ANI to be eligible for payphone compensation:

As we see it, that makes no real difference: whether an LEC transmits the Flex-ANI digits to the payphone, which then transmits them — necessarily back through the LEC — into the system, or whether that circular route is avoided and the LEC adds the Flex-ANI digits when the call comes to it from the payphone, the result is necessarily the same. By the time the call leaves the LEC and enters the system, the Flex-ANI digits will be attached — or should be.

GCB, slip op. at 5592.

B. Carriers Were Given The Ability To Utilize Flex-ANI As a Means of Per-Call Tracking And Compensation And Therefore Must Be Able To Rely Upon The Presence Or Absence of Payphone “Coding Digits” For Compensation Purposes

Petitioners are wrong in claiming that PSPs have no ability to monitor or confirm that Flex-ANI is being transmitted by LECs with their payphone calls. *Petition* at 8, 11, 15-16. There are procedures for determining whether LEC payphone lines are operating correctly, test numbers available from IXC and other non-technical means — such as an unexpected drop in completion rate (and thus compensation) from a Completing Carrier — for PSPs to utilize as “red flags” for identifying and correcting a system deficiency.

But that is not the issue presented to the Commission. Rather, it is whether under the Flex-ANI rules, carriers may utilize Flex-ANI coding digits as the basis for an accurate call tracking system. Under the payphone compensation regulations a PSP’s obligation may, in fact, be ended once the payphone owner orders a payphone line from a LEC. That the PSP has met its

²⁵ For PSPs to be eligible for compensation, “payphones will be required to transmit specific payphone coding digits.” *Id.*, 13 FCC Rcd. at 5006-07 at ¶ 13.

individual obligations, however, does not mean that it can lawfully recover unpaid compensation from Completing Carriers for calls that lack correct Flex-ANI.

It is beyond question that the Commission permits IXC's to utilize Flex-ANI as the basis for their payphone call tracking systems. Indeed, since the Commission itself has emphasized that an "accurate" system under Section 64.1310 (a)(1) does not need to be perfect,²⁶ there is no basis to assert that failure to accurately track "each and every" payphone call is somehow *per se* unreasonable under the Act. While a Completing Carrier is not required to rely on Flex-ANI, that system was mandated in order to provide the precise per-call information necessary for IXC's to reliably track payphone calls and, as the Ninth Circuit found (and Petitioners do not deny), is the industry standard for identifying payphone traffic. *GCB*, slip op. at 5584 ("Flex-ANI has become the standard method for determining whether a call originated from a payphone."). Indeed, the Commission in 2003 ruled that as a Completing Carrier, an SBR "must pay a PSP directly based on the SBR's own call tracking data." *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19975 at ¶ 1 (2003). Since that call tracking data is allowed to consist of Flex-ANI information supplied with the calls, the necessary conclusion is that IXC's must pay compensation for all completed calls that Flex-ANI information shows were made from payphones.

In short, carriers were given the ability by this Commission to utilize Flex-ANI as a means of per-call tracking and compensation and, therefore, must be able to rely upon the presence or absence of payphone "coding digits" in discharging their compensation obligations

²⁶ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19994 ¶ 39 n.109 (2003).

under the per-call payphone rules. Petitioners' convoluted attempts to argue otherwise (*Petition* at 31-37) are invalid. This Commission has hardly "made clear in several ways" that Flex-ANI transmission is not a condition precedent to per-call compensation. *Id.* at 32. The exceptions Petitioners cite — such as locations where Flex-ANI is not available, the period more than a decade ago prior to implementation of Flex-ANI, and carriers that do not rely on Flex-ANI for payphone call tracking purposes — are irrelevant to the legal issue presented here. That is the question whether a carrier permissibly relying on Flex-ANI as its payphone call-tracking mechanism is entitled to limit compensation to calls delivered with proper Flex-ANI identifiers. None of those other circumstances has any bearing on this question.

Petitioners appear to suggest that carriers are required to remit payphone compensation without regard to Flex-ANI because the Commission has never explicitly stated that its receipt *for particular calls* is a legal predicate to payment. But the Bureau has expressly called Flex-ANI a "prerequisite" to per-call compensation, and the full Commission itself has repeatedly declared that both the "generation" and "transmission" of Flex-ANI with all payphone calls are required. In fact, in the 2003 *Remand Order*,²⁷ the FCC explained that from the very start of its payphone regime in 1996:

the Commission required the local exchange carriers (LECs) *to transmit with every payphone call* the Automatic Number Identification (ANI) digits for each payphone, including each LEC payphone, *to enable a facilities-based carrier to recognize in its call tracking system that a call had originated with a payphone.*

At bottom, Petitioners would have this Commission believe that it imposed a mandatory call-identifying technology on the telecommunications industry, yet should apply its payphone compensation rules such that use and reliance on that technology is legally irrelevant. That non-

²⁷ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 199981-82 at ¶ 13 (2003) (emphasis supplied).

sensical interpretation — which directly conflicts with language the Commission has consistently used to describe the Flex-ANI obligation — cannot be adopted without an unjustified departure by this agency from the terms repeatedly employed in its orders and the specific call-tracking obligation imposed on IXC's under Section 64.1310 (a)(1) of its rules.²⁸

II. REQUIRING PAYPHONE COMPENSATION “IRRESPECTIVE” OF THE TRANSMISSION OF FLEX-ANI CODING DIGITS WOULD MAKE FLEX-ANI IRRELEVANT, STRANDING THAT INVESTMENT AND NULLIFYING THE COMMISSION’S PER-CALL COMPENSATION PLAN

The gist of the *Petition* is that because the Commission has addressed “the equity of placing the responsibility for tracking and paying coinless calls on the Completing Carrier,” per-call compensation to PSPs must be owed “irrespective of whether payphone-specific coding digits are received for a particular call.” *Petition* at 6. That the IXC is the “primary economic beneficiary” of dial-around calls (*id.*), however, has no bearing on the appropriate role of Flex-ANI in the Commission’s per-call payphone compensation plan.

Petitioners repeat the fallacy that “Section 276 of the Act [requires] the Completing Carrier to provide per-call compensation to the PSP for each completed call.” *Id.* at 6, 37. That is manifestly untrue. The Act itself imposes no compensation or any other obligation on IXC's, which are entirely a create of this Commission’s rules and orders.²⁹ Nor does the Commission’s

²⁸ The Commission’s 2003 *Remand Order*, which also moved payment responsibility to the SBR as Completing Carrier, summarized that “[i]n satisfying its liability obligation to a PSP, the SBR must establish its own call tracking system, have a third party attest that the system accurately tracks payphone calls to completion, and pay a PSP directly based on the SBR’s own call tracking data.” *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19975 at ¶ 1 (2003). There has never been any contention in this case that U.S. South did anything other than precisely what is required by these rules.

²⁹ Section 276 is directed to the FCC alone. That is why the courts have unanimously concluded that a claim for payphone compensation cannot arise under Section 276 itself. *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007); *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1064 (9th Cir. 2005),

proper recognition of the “equity” of requiring SBRs to track completed payphone calls at all lead to the conclusion that the transmission of payphone-specific Flex-ANI is irrelevant to the compensation requirement. Payphone traffic is a complex system, involving several different entities and carriers, all of which must operate properly for payphone calls to be identified, tracked, completed and compensated. To isolate the obligations of a PSP alone, without reference to the corresponding mandates on LECs and IXC, is to allow equity to override the law as expressed in this Commission’s regulations. As the Commission has ruled, “[s]ection 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides.”³⁰

The result of Petitioners’ unprecedented interpretation of the Commission’s rules is to read the Flex-ANI requirement out of the payphone plan entirely. Under GCB’s approach, if the serving LEC fails to configure Flex-ANI correctly, if the LEC’s switch software malfunctions, or if the Flex-ANI system fails for any reason to recognize a PSP line as a payphone line (and thus, as here, transmits incorrect, non-payphone Flex-ANI coding digits), responsibility in each of these circumstances would nonetheless lie totally with the SBR as Completing Carrier. The *Petition* does not discuss the “equity” of that untoward result because there is none.

Petitioners also rely heavily on the uncontested fact that “the PSP has neither any visibility into nor any control over the network[s] over which a call is carried.” *Petition* at 6.

aff’d, 550 U.S. 45 (2007); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-51 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). “[T]he conclusion that it is ‘unreasonable’ to fail ... to reimburse [PSPs] is not a § 276 conclusion; it is a § 201(b) conclusion.” *Global Crossing*, 550 U.S. at 60. Moreover, “[not] every violation of FCC regulations is an unjust and unreasonable practice.” *North County Comms. Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1159 (9th Cir. 2010).

³⁰ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21302-03 ¶ 82 (2002). “Section 276 does not permit the Commission to lawfully ‘require one company to bear another one’s expenses.’” *Id.* (citing *Illinois Public Telecomms. Assn. v. FCC*, 117 F.3d 555, 556 (D.C. Circuit 1997)).

That is true, but not directly relevant. This Commission labored mightily to craft a payphone scheme that allocated responsibility among all parties and carriers involved in the “call path” of payphone-originated traffic. As the 2003 *Remand Order* explained, the per-call payphone compensation plan is designed to “strike the best balance between full compensation for the PSPs and maximum fairness to other carriers.”³¹ It took the PSPs’ limited information into account by imposing the call-tracking obligation on IXC and the Flex-ANI responsibility on LECs. That balance of rights and responsibilities would be evaded by permitting PSPs to recover per-call compensation when the basis for the right — the transmission of payphone-specific Flex-ANI information — is absent.

This is not to say that if a Completing Carrier’s system is faulty and fails to recognize or record Flex-ANI, in other words is not “accurate” for purposes of Section 64.1310 (a)(1), an IXC can lawfully refuse to remit per-call compensation. In such a circumstance, pointedly **not** presented in this case or by the *Petition*, the Completing Carrier would have violated the Commission’s payphone rules and should presumptively be liable. The *Petition* nonetheless seeks to go further by arguing that the PSP has no responsibility to establish that the IXC was in any way responsible or at fault for the Flex-ANI failure.

Such a result is both inequitable and unlawful because, as noted, a Completing Carrier’s compensation obligation arises only under the Commission’s payphone compensation rules, not the terms of Section 276 of the Act itself. In the absence of a violation by the IXC, the FCC has no basis in law to require compensation to be paid for calls as to which the predicates for compensation do not exist. One of those is the “transmission” of Flex-ANI. As between the

³¹ *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 18 FCC Rcd. 19975, 19976 at ¶ 4 (2003).

Completing Carrier and the PSP, it is undeniable that the Commission has consistently ruled that the transmission of payphone-specific Flex-ANI is a “prerequisite” to payphone compensation.

Petitioners’ efforts to evade that reality has absurd consequences. The most significant of these is that the entire process of mandating that LECs reconfigure their central offices (“COs”) to support Flex-ANI would become a nullity. That massive effort was not simple, quick or without cost; indeed, the Bureau was forced to waive it temporarily because the LECs found that converting to Flex-ANI was far more time-consuming and difficult than anticipated.³² Nonetheless, under Petitioners’ approach that capital investment in switch upgrades would be stranded because IXC’s would receive no benefit from Flex-ANI and, as a business matter, would have no incentive to order it from the LECs. If compensation liability attaches “irrespective of whether payphone-specific coding digits are received for a particular call,” *Petition* at 6, there is no benefit to a Completing Carrier from Flex-ANI at all.

To be clear, payphone compensation disputes do not arise in a vacuum. Here, for instance, GCB and Lake Country had known for a long time that their completion rate to U.S. South was lower than other IXC’s, but refused to notify U.S. South, to test their lines with Petitioners’ serving LECs, to challenge the call-tracking audit certifications filed by U.S. South or to file a compensation complaint with the Commission. They chose instead, after remaining silent for years, to proceed directly to federal court without any proof that U.S. South’s system was at all deficient and, remarkably, never even claimed that U.S. South had violated *any* Commission regulation.

³² *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd. 4998 (1998).